No. 17-269

In the Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "right of taking fish, at all usual and accustomed grounds and stations * * * in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, *e.g.*, Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133, imposes a duty on petitioner to refrain from building or maintaining culverts that directly block passage of a large number of anadromous fish to and from those grounds and that significantly diminish fish populations available for tribal harvest so that the Tribes cannot sustain a livelihood from their fisheries.

2. Whether the court of appeals correctly declined to apply the doctrines of waiver or laches to bar this suit, which addresses a treaty reserving rights and resources that pre-date the State, the scope of which has been in dispute for more than 100 years.

3. Whether the court of appeals correctly held that the district court did not abuse its discretion in enjoining petitioner to provide fish passage by addressing barrier culverts on a reasonable schedule necessary to ensure that petitioner acts expeditiously to remedy a violation of tribal treaty rights.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 58a-126a) is reported at 853 F.3d 946. The relevant opinions of the district court are reported at 20 F. Supp. 3d 828 (Pet. App. 249a-272a), 20 F. Supp. 3d 986 (Pet. App. 127a-179a, 235a-242a), and 19 F. Supp. 3d 1317 (Pet. App. 273a-282a). Additional opinions of the district court (Pet. App. 180a-234a, 243a-248a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2017. A petition for rehearing was denied on May 19, 2017 (Pet. App. 1a-57a). The petition for a writ of certiorari was filed on August 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1854 and 1855, in exchange for vast cessions of land in what is now the western part of the State of Washington, respondent Indian Tribes entered into treaties securing for themselves periodic monetary payments, smaller tracts of land set aside for their exclusive use, and the preservation of fishing rights in the ceded areas. Pet. App. 68a; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-662 (1979) (*Fishing Vessel*). The treaties, known as the Stevens Treaties, were negotiated under the leadership of Governor Isaac Stevens of the Washington Territory. Pet. App. 68a; *Fishing Vessel*, 443 U.S. at 666.

From time immemorial, the Tribes have used and relied on fish for commercial, subsistence, and ceremonial purposes and have exercised that right at particular places. *Fishing Vessel*, 443 U.S. at 665-666; see *United States* v. *Winans*, 198 U.S. 371, 381 (1905) (fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed"). The United States treaty negotiators were well aware of "the vital importance of the fisheries" to the Tribes, and they understood that without preservation of the Indians' off-reservation right to take fish at particular sites, the Tribes would not have entered into the treaties, *Fishing Vessel*, 443 U.S. at 666-667, which reserved property rights in the Tribes that were "continuing against the United States and its grantees as well as against the State and its grantees." *Winans*, 198 U.S. at 381-382.

To preserve the Tribes' fishing right, the Stevens Treaties provide in essentially identical language: "The right of taking fish, at all usual and accustomed grounds

and stations, is further secured to said Indians, in common with all citizens of the Territory." Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133; see, *e.g.*, Pet. App. 68a; C.A. E.R. 44-45. The negotiators assured the Tribes that, under the treaties, they would have "continued access to their usual fisheries" and "would still be able to feed themselves and their families forever." Pet. App. 129a; see *Fishing Vessel*, 443 U.S. at 667 n.11 (Stevens assured the Indians that "'[t]his paper secures your fish'") (citation omitted). Both the United States and the Tribes viewed the protection of the Tribes' off-reservation fishing right as a critical element of the treaties. *Fishing Vessel*, 443 U.S. at 666-668.

2. As the availability of fish—in particular, salmon and other anadromous fish—has diminished, disputes have ensued between petitioner State of Washington and the Tribes over fishing rights. Pet. App. 7a; *Fishing Vessel*, 443 U.S. at 670.[1] In 1970, the United States, on its own behalf and as trustee for several of the Tribes, sued petitioner in federal district court. *Fishing Vessel*, 443 U.S. at 669-670. The United States sought declaratory and injunctive relief based on the fishing-rights clause of the Stevens Treaties. *Ibid.* The district court divided the case into two phases. Pet. App. 78a.

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[1] Before *Fishing Vessel* and the present dispute, this Court addressed the Tribes' treaty fishing right in *Winans*, 198 U.S. 371; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968); *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973); and *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165 (1977).

a. In Phase I, the district court established the locations of the Tribes' "usual and accustomed" fishing grounds and held that the Tribes could take up to 50% of the harvestable fish from those grounds. *United States* v. *Washington*, 384 F. Supp. 312, 332-333, 343-344 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The court issued a detailed injunction, *id.* at 413-420, and it reserved jurisdiction to hear unresolved issues arising out of the treaties, including those it had bifurcated for later determination, *id.* at 333.

The district court's ruling met substantial resistance from petitioner and spawned numerous suits that ultimately reached this Court in *Fishing Vessel*, where the district court's interpretation of the treaties and issuance of injunctive relief were affirmed. This Court rejected petitioner's argument that the treaties guaranteed the Tribes only an "'equal opportunity'" to harvest fish with non-Indians, 443 U.S. at 676-679 & n.22, and affirmed the Tribes' right to an equal share of the harvestable fish, *id.* at 685. Furthermore, the Court interpreted the fishing-rights clause as promising not only an equal share of the fish with non-Indians, but also protection for the Tribes' supply of fish. *Id.* at 676. "Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters," the Court explained, the Tribes "would be unlikely to perceive a 'reservation' of that right as merely the chance * * * to dip their nets" into the waters. *Id.* at 678-679. With respect to the equitable share of fish, this Court specified that 50% was the maximum allocation, but not a minimum because the treaty rights secured "so much as, but no more than, is

necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.* at 686.

b. In 1976, the United States initiated Phase II of the litigation and requested a declaratory judgment clarifying whether the Tribes' treaty fishing right extends to hatchery fish and requires protection from significant environmental degradation of the fish habitat necessary for survival of fish populations. *United States* v. *Washington*, 506 F. Supp. 187, 194 (W.D. Wash. 1980), aff'd in part and vacated in part, 759 F.2d 1353 (9th Cir.) (per curiam), cert. denied, 474 U.S. 994 (1985). The district court held that the Tribes' fishing right extends to an equal share of hatchery fish. *Id.* at 195-202. The court further held that the Tribes' right imposes on petitioner a correlative duty "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs." *Id.* at 208. The decision, however, did not address any particular habitat degradation or specify any remedy. *Ibid.*

The court of appeals affirmed in part and vacated in part. *United States* v. *Washington*, 759 F.2d 1353 (9th Cir.) (en banc) (per curiam), cert. denied, 474 U.S. 994 (1985). The court affirmed the Tribes' right to a share of hatchery fish. *Id.* at 1358-1360. The court vacated the declaratory judgment on the environmental issue, concluding that it was "contrary to the exercise of sound judicial discretion" to declare a sweeping right of habitat protection absent a concrete factual dispute. *Id.* at 1357-1358. Although the court did not dispute that petitioner has some obligations under the Stevens Treaties not to significantly reduce fish populations, it held that the legal standards that govern petitioner's precise duties "will depend for their definition and articulation

upon concrete facts which underlie a dispute in a particular case." *Ibid.*

3. This litigation presents those "concrete facts." The abundance of salmon and the areas open to tribal harvest have decreased substantially due to the loss of salmon habitat caused in significant part by the construction and maintenance of barrier culverts under state roads. Pet. App. 132a. For many years, the Tribes complained that petitioner had built roads across salmon-bearing streams, and culverts under those roads—referred to as "barrier culverts"—allowed passage of water, but not passage of salmon. *Id.* at 7a-8a, 77a-78a. Salmon are anadromous fish, meaning that they hatch in fresh water, migrate to the ocean to mature, and return to fresh water to spawn. *Id.* at 8a, 77a. Access to spawning grounds is therefore "essential to their reproduction and survival." *Id.* at 8a. Barrier culverts block approximately 1000 linear miles of streams comprising almost five million square meters of salmon habitat. *Id.* at 157a, 162a.

In 1997, the Washington Department of Fish & Wildlife (WDFW) and the Washington State Department of Transportation (WSDOT) reported that WSDOT culverts alone blocked an area of approximately 1.6 million square meters of fish habitat, which they estimated would produce 200,000 additional adult salmon each year. Pet. App. 109a. In 2001, the Tribes filed a request for determination seeking declaratory and injunctive relief against petitioner, based on WDFW's records and supporting evidence. C.A. E.R. 1008-1021. The Tribes, joined by the United States, sought to enforce a duty owed by petitioner to "refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish

that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability to earn a moderate living from the fishery." *Id.* at 1013-1014.

Petitioner asserted defenses of waiver and estoppel to the claims of treaty violations. Pet. App. 274a. The district court rejected those defenses, concluding that the United States could not waive the treaty rights of Indians through the actions of federal officials that funded and purportedly approved the culverts. *Id.* at 274a-275a.

On summary judgment, the district court ruled in favor of the Tribes on the issue of treaty fishing rights. Pet. App. 249a-272a. The court concluded that the "right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon [petitioner] to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest," and that petitioner "currently owns and operates culverts that violate this duty." *Id.* at 271a.

In 2009 and 2010, the district court held a bench trial to determine the appropriate remedy. Pet. App. 128a. In 2013, the court issued a memorandum and decision, including nearly 200 findings of fact. *Id.* at 127a-179a. The court found that improperly designed culverts have resulted in the loss of spawning and rearing habitat, both by blocking passage of fish and by causing other negative effects on streams. *Id.* at 160a-161a. The court further found that correction of barrier culverts is a

cost-effective and scientifically sound method of restoring habitat that "provides immediate benefit in terms of salmon production." *Id.* at 166a.

The district court, based on WDFW records, found that at the time of trial, state-owned culverts blocked access to about 1000 miles of streams, constituting nearly five million square meters of habitat. *Id.* at 156a-157a, 162a. At the rate petitioner was addressing those barrier culverts, the court found, "it would take the State more than 100 years to replace the 'significantly blocking' WSDOT barrier culverts that existed in 2009." *Id.* at 162a-163a.

The district court also issued conclusions of law, including that:

- "Where culverts block passage of fish such that adult salmon cannot swim upstream to spawn and juveniles cannot swim downstream to reach the ocean, those blocked culverts are directly responsible for a demonstrable portion of the diminishment of the salmon runs." Pet. App. 175a.
- "The depletion of salmon stocks and the resulting diminished harvests have harmed the Tribes and the individual members economically, culturally, and personally," and the "Tribes have demonstrated * * * that they have suffered irreparable injury in that their Treaty-based right of taking fish has been impermissibly infringed." *Id.* at 175a-176a.
- "Despite past State action, a great many barrier culverts still exist, large stretches of potential salmon habitat remain empty of fish, and harvests are still diminished." *Id.* at 176a.

- "State action in the form of acceleration of barrier correction is necessary to remedy this decline in salmon stocks and remove the threats which face the Tribes," and petitioner "has the financial ability to accelerate the pace of barrier correction." *Id.* at 177a.
- "[I]t is in the public's interest * * * to accelerate the pace of barrier correction" because "[a]ll fishermen * * * will benefit from the increased production of salmon" and "[t]he general public will benefit from the enhancement of the resource and the increased economic return from fishing." *Id.* at 178a.

Based on those findings of fact and conclusions of law, the district court granted the permanent injunction requested by the Tribes and the United States. Pet. App. 179a, 235a-242a. The injunction ordered petitioner to prepare a list of culverts under state-owned roads that are salmon barriers, using a methodology adopted by the WDFW. *Id.* at 236a. Culverts maintained by state agencies other than the WSDOT were to be corrected by October 2016—the date by which those agencies were already expected to correct such culverts. *Id.* at 237a. The injunction ordered the WSDOT to correct many of its high-priority barrier culverts within 17 years, allowing deferral of some under certain conditions, and to correct the remainder at the end of the culverts' useful life or in connection with other highway projects. *Id.* at 237a-238a. The injunction further provided that petitioner can deviate from design standards if it can establish or the parties agree that the standards are not feasible in specific circumstances. *Id.* at 239a. Petitioner declined to participate in the formulation of

the injunction or to provide alternative proposals or time tables. *Id.* at 107a.

4. a. The court of appeals affirmed. Pet. App. 58a-126a. The court rejected petitioner's argument that it "has no treaty-based duty to refrain from building and maintaining barrier culverts," and, indeed, that it "has the right, consistent with the Stevens Treaties, to block every salmon-bearing stream feeding into Puget Sound." *Id.* at 86a-88a. The court explained that "[t]he Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow [petitioner] to diminish or destroy the fish runs." *Id.* at 91a. The court concluded that Governor Stevens "did not make * * * such a cynical and disingenuous promise." *Id.* at 91a-92a. Accordingly, the court held that the Tribes' fishing right imposes a duty on petitioner to refrain from constructing and maintaining culverts under state roads that block or restrict passage of anadromous fish to and from traditional tribal fishing grounds. *Id.* at 94a-96a. In so ruling, the court explained that state culverts blocked at least 1000 miles of streams suitable for salmon habitat, and that if those culverts were modified to allow fish passage, several hundred thousand additional mature salmon would be produced every year, many of which would be available to the Tribes, whose members currently cannot obtain a moderate living from fishing. *Id.* at 95a.

The court of appeals also affirmed the district court's rejection of petitioner's equitable defenses against the United States to claims of treaty violations. Pet. App. 96a-99a. The court concluded that when the United States sues as a trustee for Indian tribes, it is not subject to equitable defenses of laches, waiver, or estoppel

based on the actions of its agents purportedly approving treaty violations. *Id.* at 97a-98a. Finally, the court rejected petitioner's arguments regarding injunctive relief. *Id.* at 104a-126a. The court concluded that there was sufficient evidence to show that state-owned barrier culverts have a substantial adverse effect on salmon, *id.* at 108a-116a, that the injunction was not an undue intrusion into state government affairs, *id.* at 121a-123a, and that the scope of the injunction was consistent both with general equitable principles and remedial principles that apply in the context of Indian treaties, *id.* at 120a-121a, 123a-125a.

b. Judge O'Scannlain, joined in full or in part by eight other judges, dissented from the denial of rehearing en banc. Pet. App. 17a-41a. In Judge O'Scannlain's view, the Stevens Treaties do not obligate petitioner to ensure that there are sufficient fish available to provide the Tribes with a moderate living. *Id.* at 21a-27a. Judge O'Scannlain further concluded that the panel opinion "could be used to challenge activities that affect wildlife habitat in other western states." *Id.* at 19a; see *id.* at 27a-32a. Judge O'Scannlain believed that the doctrine of laches should bar the United States' suit, *id.* at 32a-36a, and that the injunction was overbroad, *id.* at 36a-41a.

ARGUMENT

Petitioner does not challenge that barrier culverts impede fish passage, eliminating over 1000 miles of salmon habitat that, if accessible, would likely lead to increased fish populations. Instead, petitioner contends (i) that it did not violate the Tribes' treaty fishing right by building and maintaining road culverts that block or restrict the passage of anadromous fish to tribal fishing grounds (Pet. 18-25); (ii) that the court of appeals erred

in rejecting petitioner's equitable defenses against the United States (Pet. 25-28); (iii) and that the injunction entered by the district court violates federalism and comity principles by requiring petitioner to replace culverts without (petitioner asserts) any clear connection between culvert replacement and tribal fisheries (Pet. 28-34). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. In *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that the Stevens Treaties guarantee to the Tribes an equitable allocation of up to 50% of the harvestable fish in their usual and accustomed fishing areas. *Id.* at 685-686. That 50% share "imposes a maximum but not a minimum allocation." *Id.* at 686. That is so, the Court explained, because the Tribes' treaty fishing right "secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Ibid.*; see *United States* v. *Winans*, 198 U.S. 371, 381-382 (1905).

a. Petitioner contends (Pet. 19-22) that the court of appeals' decision conflicts with *Fishing Vessel* by imposing an affirmative duty upon petitioner to provide a certain quantity of fish that would ensure a moderate living for the Tribes. Petitioner contends that the court's decision cannot be squared with this Court's holding in *Fishing Vessel* that the Tribes are entitled to no more than one-half of harvestable fish in their usual and accustomed fishing areas, even if that amount is less than the Tribes' "'needs dictated.'" Pet. 20-21 (quoting *Fishing Vessel*, 443 U.S. at 670). Petitioner's argument is misconceived.

As petitioner explains, the Tribes in *Fishing Vessel* had argued that the treaties reserved a right to "'as many fish as their commercial and subsistence needs dictated.'" Pet. 19 (quoting *Fishing Vessel*, 443 U.S. at 670). This Court rejected that argument and instead held that the Tribes' fishing right reserves "so much as, but not more than, is necessary" to provide the Indians with a moderate living, subject to a ceiling of 50% of the harvestable run. *Fishing Vessel*, 443 U.S. at 685-686. The court of appeals' decision follows from that central tenet of *Fishing Vessel*. As the court explained, "[i]t is undisputed that at the present time fifty percent of the harvestable salmon in Puget Sound does not provide a moderate living to the Tribes," and that petitioner has acted affirmatively to build roads with barrier culverts that impair the shared resource and "substantially diminish[] the supply of harvestable salmon." Pet. App. 10a. The court's conclusion that petitioner violates the treaty fishing right by interfering with the Tribes' ability to ensure a moderate living does not conflict with the Court's statement in *Fishing Vessel* that the Tribes' are entitled only to what is necessary to provide them with a moderate living, subject to the 50% ceiling, but not to "'as many fish as their commercial and subsistence needs dictated.'" Pet. 19 (quoting *Fishing Vessel*, 443 U.S. at 670).

Furthermore, the court of appeals explicitly stated that its opinion "does not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances." Pet. App. 10a. The court acknowledged that the promise of a moderate living is not valid against "acts of God," "all human-caused diminutions, or even against all State-caused diminutions." *Ibid.* The court concluded only that, in this case

concerning only state-owned barrier culverts, petitioner violates the treaty fishing right when it acts "affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon." *Id.* at 10a-11a.

According to petitioner (Pet. 20-21), the "moderate living" standard is only an "equitable limit the State could invoke * * * as a ceiling on the tribal share of the catch, not a floor on fish harvests that the treaties always guaranteed." Under that view, it would thus be consistent with the treaties for petitioner to take actions that would "entirely eliminate the supply of harvestable salmon" so that the Tribes ends up with "fifty percent of nothing." Pet. App. 9a; see *id.* at 87a-88a. That contention is unsound. Reviewing the history of the treaties, relevant principles of treaty interpretation, and this Court's decisions in *Fishing Vessel* and other cases interpreting the treaty fishing right, the court of appeals determined that the Indians reasonably understood the treaties to recognize "not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them," *Id.* at 92a, and that those assurances do not permit petitioner to "destroy the fish runs," *id.* at 91a.

Ignoring those assurances, petitioner focuses on the court of appeals' statement in a prior en banc opinion during Phase II of the original round of litigation in this case that "'*Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish'" and instead "'mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less.'" Pet. 20 (quoting *United States* v. *Washington*, 759 F.2d

1353, 1359 (9th Cir.) (en banc) (per curiam), cert. denied, 474 U.S. 994 (1985)). That passage, which comes from the portion of the opinion holding that hatchery fish must be included in the Tribes' harvest *allocation*, does not address the issue of degradation of fish habitat that results in diminishment of the *supply* of fish. In fact, as the court of appeals stated in the sentence prior to the passage cited by petitioner, "*Fishing Vessel*'s holding that the Tribes are entitled under the treaty to an '*adequate supply of fish*' supports the inclusion of hatchery fish in the allocation." 759 F.2d at 1358 (emphasis added). That the Tribes are entitled to a share of hatchery fish in part as mitigation for the decline in the supply of fish "caused by their non-Indian neighbors" is consistent with an interpretation of the treaty fishing right that includes rights relating to the supply of fish. *Id.* at 1360. If the Tribes had no rights relating to the supply of fish, petitioner would owe the Tribes no such mitigation.[2]

Other decisions have recognized that the Tribes' treaty fishing right presumes an adequate supply of fish

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[2] Petitioner has previously not taken issue with the proposition that the "moderate living" standard applies to the Tribes' treaty right and fish supply. In Phase II, the Tribes stated in the district court that their "treaty entitlement is to a quantity of fish sufficient to supply their needs for a moderate income." C.A. Supp. E.R. 145; see *id.* at 146-147 (stating that "even if nonnatural reductions in fish runs occur, they would not violate any Indian right to take fish so long as there continues to exist fish in sufficient quantities to meet the treaty fishermen's needs"). In the face of that statement, petitioner did not raise on appeal any meaningful issue regarding the application of the moderate living standard to the treaty right. Yet, in its rehearing petition, and now its petition to this Court, petitioner attacks (Pet. 21-22) the moderate living standard as unworkable.

and a duty on Indians and non-Indians not to unilaterally destroy or significantly impact the treaty-protected resource. See, *e.g.*, *United States* v. *Washington*, 573 F.3d 701, 704 (9th Cir. 2009) ("the treaty fishing right * * * 'exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes'") (quoting *United States* v. *Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)); *United States* v. *Washington*, 520 F.2d 676, 685 (9th Cir. 1975) ("neither the treaty Indians nor the [S]tate on behalf of its citizens may permit the subject matter of these treaties to be destroyed"), cert. denied, 423 U.S. 1086 (1976); see also *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*) (Tribes do not have an untrammeled treaty fishing right "to pursue the last living steelhead" into their own fishing nets that would unilaterally deny non-Indians the shared resource and their fair share of fish); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 173-177 (1977). Thus, petitioner's citation to other cases (Pet. 20) that simply reference *Fishing Vessel's* allocation methodology of ensuring Tribes half of the harvestable share, adjusted downward if tribal needs can be met with less, has little force. Those cases cannot be read to say that petitioner, through its barrier culverts resulting in diminishment or destruction of fish runs, may leave far fewer (or no) fish for the Tribes.

b. Petitioner further contends (Pet. 22-25) that the court of appeals' decision conflicts with holdings of this Court on treaty interpretation. It does not. This is not a case in which the court of appeals has rewritten a treaty "'to remedy a claimed injustice'" or created a

"massive new right." Pet. 22-23 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)). The court relied on well-established standards of treaty construction to hold that the treaties reserved the Tribes' right to continue to take fish at their usual and accustomed fishing places to maintain their livelihood, and that petitioner's barrier culverts violated that right by blocking fish passage and significantly reducing fish population. Pet. App. 86a-96a. To reach that holding, the court looked to the express words of the fishing clause, treaty negotiations and other historical materials, and decisions of this Court addressing the fishing clause. *Ibid.* That approach is consistent with principles of treaty interpretation set forth in *Choctaw Nation*, as petitioner acknowledges (Pet. 22-23). See 318 U.S. at 431-432 (in ascertaining the meaning of treaties, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); accord *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

Moreover, petitioner's contention (Pet. 22) that the court of appeals declared a new right "nowhere mentioned in the treaties" ignores the canon governing Indian treaty interpretation that treaty words must be construed "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899). This Court has explicitly relied upon that rule to "broadly interpret[] [the Stevens Treaties] in the Indians' favor" in the past. *Fishing Vessel*, 443 U.S. at 675-676 (citing *Tulee* v. *Washington*, 315 U.S. 681 (1947); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919)); see *Winans*, 198 U.S. at 381; see also Pet. App. 88a-90a (discussing cases). Petitioner's

contention also overlooks that the "'treaty [i]s not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted,'" and thus silence implicates a reservation of rights under the treaty. *Winans*, 198 U.S. at 381 (citation omitted).

Nor does the court of appeals' decision conflict with the other decisions of this Court cited by petitioner. See Pet. 23. Both *Oregon Department of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), and *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450 (1995), involved the question whether treaty rights reserved within a tribe's reservation or limits could be extended by implication outside such areas. The treaty language in *Klamath Indian Tribe*, unlike the language of the Stevens Treaties, confirmed that the express tribal rights to hunt and fish were meant to exist only "within the limits of the reservation." 473 U.S. at 766; see *id.* at 766-768. Similarly, in *Oklahoma Tax Commission*, the treaty, by its plain terms, applied only to persons and property "'within [the tribe's] limits,'" such that even liberal construction could not support the tribe's claim. 515 U.S. at 465-466 (citation omitted). Here, the treaties expressly reserved fishing rights and interests both on and off the reservation.

The court of appeals also correctly relied on *Winters* v. *United States*, 207 U.S. 564 (1908), and *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), to hold that, even if Governor Stevens had not made an explicit promise that "'[t]his paper secures your fish,'" that promise should be inferred to support the purpose of the treaties because the Tribes' treaty right "would be worthless without harvestable fish." Pet. App. 91a-94a (quoting *Fishing Vessel*, 443 U.S. at 667 n.11). In *Winters*, this Court

held that the express reservation of land for the Fort Belknap Indian Reservation impliedly reserved a sufficient interest in water from the river to fulfill the purposes of the reservation. 207 U.S. at 576-577. Accordingly, the Court upheld an injunction barring non-Indians from diverting water upstream that was required to irrigate lands on the reservation. *Ibid.*; see *Adair*, 723 F.2d at 1408-1415 (treaty right to fish implied reservation of water to support tribal fisheries).

Here, the destructive consequences of state-owned barrier culverts on the Tribes' ability to harvest fish justified the injunction requiring petitioner to replace or modify barrier culverts. As this Court made clear in *Fishing Vessel*, the Tribes' reservation of the right to take fish at usual and accustomed grounds includes more than the bare right to "dip their nets" into treaty waters and net "virtually no catch at all." 443 U.S. at 679, 677 n.22. Rather, it includes recognition of a right that precludes others from "crowd[ing] the Indians out of any meaningful use of their accustomed places to fish," *id.* at 676, whether those impediments be fish wheels (*Winans*, 198 U.S. at 382-384), state laws restricting the means of taking fish when not required by conservation reasons (*Puyallup Tribe II*, 414 U.S. at 45, 48; *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968)), or—as here—building or maintaining culverts that interfere with the ability of salmon to migrate up or downstream.

c. Petitioner contends (Pet. 32-34) that this case warrants review because the court of appeals' decision will be "'used to attack a variety of development, construction, and farming practices * * * throughout the Pacific Northwest.'" Pet. 33 (citation omitted). That

concern is unfounded. The court made clear that its ruling is based on an exhaustive legal analysis of treaty fishing rights, the significant destructive impact of barrier culverts, and petitioner's duty as defined by the specific facts presented by this case. Pet. App. 11a-12a. The court adhered to the directive in the en banc decision in Phase II to evaluate habitat-protection duties based "upon concrete facts which underlie a dispute in a particular case." *Washington*, 759 F.2d at 1357. The future reach of this decision and the contours of the treaty right "will depend for its precise legal formulation on all of the facts presented by a particular dispute." *Ibid.*; see Pet. App. 11a-12a. Hence, Judge O'Scannlain's assertion (Pet. App. 28a-29a) that any activity that negatively affects fish habitat could be an "automatic Treaty violation" is wrong. In any event, petitioner does not contest that its culverts have a significant, deleterious effect on salmon populations, or that such effect can be remediated. As a result, and because the decisions below are based only on these "concrete facts," this case would be a poor vehicle to explore the possible application of the court of appeals' ruling in other circumstances.

2. Petitioner further contends (Pet. 25-28) that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals on the applicability of equitable defenses to the treaty claims at issue. That is incorrect. In the district court, petitioner argued that action and inaction by the United States in funding and approving (or failing to object to) petitioner's culverts barred the United States from asserting a claim that those culverts violate the Tribes' treaty rights. Binding authority forecloses that argument, and the court of appeals correctly rejected petitioner's equitable defenses.

Only Congress can abrogate or limit rights reserved under an Indian treaty. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202; *United States* v. *Dion*, 476 U.S. 734, 738-740 (1986); *Fishing Vessel*, 443 U.S. at 690. Accordingly, a defense to a suit by the United States to enforce rights under an Indian treaty cannot be based on actions of government officials allegedly waiving the rights of the Indians under the treaty. See *Cramer* v. *United States*, 261 U.S. 219, 234 (1923) (where Indians had rights of occupancy to land, "no officer or agent of the Government had authority to deal with the land upon any other theory," and the "acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights"); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902) (government agents had no authority to waive terms of Indian timber contracts, and their actions could not estop the government); *United States* v. *City of Tacoma*, 332 F.3d 574, 581 (9th Cir. 2003) ("when the government acts as [a] trustee for an Indian tribe, it is not at all subject to that defense," *i.e.*, estoppel); *United States* v. *Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (no defense of laches or estoppel available against Government acting as trustee for Indian tribe), cert. denied, 352 U.S. 988 (1957).

Petitioner contends (Pet. 25-28) that the court of appeals' rejection of petitioner's equitable defenses conflicts with this Court's decision in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005), and Second Circuit cases applying that decision. In *Sherrill*, this Court considered the Oneida Nation's claim to immun-

ity from taxation for land that had been out of its possession for more than 200 years. *Id.* at 202-203. Given the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by that State and its counties and towns for 200 years, and the Oneidas' long delay in seeking judicial relief, the Court found that standards of federal Indian law and equity practice precluded the Tribe from unilaterally reviving its sovereignty over the parcels at issue. *Id.* at 202-203, 214-220.

As the panel below explained, this case is "radically different" from *Sherrill*. Pet. App. 99a. This case does not involve an attempted unilateral assertion of sovereignty over territory that had lost its Indian character many years earlier. Unlike in *Sherrill*, there can be no argument here that the Tribes have done anything to authorize petitioner to construct and maintain barrier culverts or have attempted to revive a long-dormant dispute. *Ibid.* To the contrary, the Tribes and petitioner "have been in a more or less continuous state of conflict over treaty-based fishing rights for over one hundred years." *Ibid.* Moreover, the Court in *Sherrill* had no occasion to consider whether equitable defenses would apply against the United States or to specific rights directly arising from a treaty.

Nor does the court of appeals' decision conflict with Second Circuit cases applying *Sherrill*, as petitioner contends (Pet. 26-27). In those cases as well, the Second Circuit did not consider whether actions of federal officials could waive the treaty rights of tribes and subject treaty claims by the United States on behalf of the tribes to waiver or other equitable defenses. In *Cayuga Indian Nation* v. *Pataki*, 413 F.3d 266 (2d Cir. 2005),

cert. denied, 547 U.S. 1128 (2006), the majority held in factual circumstances similar to *Sherrill* that the doctrine of laches could be applied to a land claim by the United States on behalf of a tribe, at least in "'egregious instances'" involving very long delay and where relief would be highly disruptive. *Id.* at 278-279 (citation omitted). This case does not involve an ancient land claim that would be disruptive of long-established patterns on non-Indian ownership. And the holding in *Cayuga Indian Nation* was limited to laches, and it did not suggest that the court there would have accepted a defense based on waiver due to the actions of federal officials. Likewise, the other Second Circuit cases cited by petitioner did not suggest that there is a waiver defense against claims of tribes in circumstances such as in this case. See *Oneida Indian Nation* v. *County of Oneida*, 617 F.3d 114 (2010), cert. denied, 565 U.S. 970 (2011); *Stockbridge-Munsee Cmty.* v. *New York*, 756 F.3d 163 (2014) (per curiam), cert. denied, 135 S. Ct. 1492 (2015).

Moreover, the factual circumstances that led this Court and the Second Circuit to rely on principles of equity to reach their holdings are not present here. This is not a case in which the Tribes or the United States did nothing to assert their rights for two centuries. See *Ute Indian Tribe of the Uintah* v. *Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016) (distinguishing *Sherrill* "on a very different record where the land was sold to nontribal members and neither the tribe nor the federal government did anything to assert their rights '[f]rom the early 1800's into the 1970's'") (citation omitted) (brackets in original), cert. denied, 137 S. Ct. 2328 (2017). Rather, the treaty fishing right has been repeatedly asserted by the Tribes and consistently upheld by this Court for more than a century.

3. Petitioner further contends (Pet. 28-32) that the court of appeals' decision conflicts with decisions of this Court addressing the proper scope of injunctive relief. According to petitioner (Pet. 28), this Court's precedents dictate that injunctions must be narrowly tailored to redress violations of federal law, must be imposed only after careful consideration of public impacts, and must consider federalism principles when entered against a State. After forgoing any input into the development of the remedy before the district court, petitioner now contends (Pet. 29-32) that the injunction violates those principles. Petitioner's fact-bound and untimely challenges to the terms of the injunction ignore the extensive evidence presented in the district court and present no issue warranting review by this Court.

a. Petitioner contends (Pet. 29-30) that the injunction requires it "to replace culverts that will make no difference" to salmon because of the presence of some barrier culverts owned by others on the same streams. But as the court of appeals held, it was appropriate for the district court to require petitioner to remedy its barrier culverts on streams notwithstanding that the streams might have other man-made barriers. The district court in this regard merely followed the same methodology that petitioner uses to identify and prioritize culverts that should be remedied. Pet. App. 15a, 110a-111a. Furthermore, Washington law imposes some obligation to allow fish passage on non-state barrier culverts, many of which are in the process of being repaired or replaced by private parties. *Id.* at 16a, 110a-111a. State reports have shown that in nearly 90% of such cases, other barriers were upstream of state-owned barrier culverts, and 69% of the 220 downstream non-state barriers allowed partial passage of

fish. *Id.* at 111a. And, as the court of appeals noted, the injunction allows petitioner to postpone hundreds of lower priority culverts, which must "be remediated only at the end of their natural life or in connection with an independently undertaken highway project." *Id.* at 16a. Petitioner's contention that the injunction requires it to expend unnecessary costs to address its barrier culverts lacks merit and its cost estimates are not supported by evidence in the record. *Id.* at 118a-119a; *id.* at 16a (finding "no plausible basis for the State's claim of $1.88 billion").

b. Contrary to petitioner's contention (Pet. 30-31), the record also "contains extensive evidence, much of it from [petitioner] itself," that state-owned barrier culverts have a substantial adverse effect on salmon. Pet. App. 115a. The district court's findings show that petitioner has admitted for years, including in the 1997 WDFW and WSDOT report, *id.* at 147a, that barrier culverts diminish salmon production and that correction of state-owned barrier culverts is critical to salmon recovery, see *id.* at 115a, 131a, 147a, 155a. Based on an extensive record, the district court found that "State-owned barrier culverts * * * have a significant total impact on salmon production," *id.* at 162a, and that "[c]orrection of fish passage barrier culverts is a cost-effective and scientifically sound method of salmon habitat restoration [that] provides immediate benefit in terms of salmon production," *id.* at 166a.

c. Petitioner's federalism-based objections to the injunction (Pet. 29-30) rely on general language from cases involving conventional structural injunctions, not enforcement of Indian treaty rights. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 448 (2009) (requiring compliance with the Equal Educational Opportunities Act of 1974,

20 U.S.C. 1701 *et seq.*); *Rizzo* v. *Goode*, 423 U.S. 362 (1976) (requiring reform of police department). In *Fishing Vessel* and other cases directly on point, this Court "affirmed detailed injunctions requiring [petitioner] to comply with the very Treaties at issue in this case." Pet. App. 124a. The injunctions ordered in earlier phases of the case were broader in scope than the injunction here, which only puts petitioner on a schedule to identify and repair or replace barrier culverts. In *Fishing Vessel*, this Court stressed that the treaties are the supreme law of the land in rejecting federalism-based objections to injunctive relief against petitioner; it also stressed that the district court has discretion to issue a "detailed remedial order[]" against petitioner to provide the Tribes with meaningful relief under the treaties. 443 U.S. at 695-696.

d. There is no merit to petitioner's contention (Pet. 31-32) that the injunction is an abuse of discretion because it did not properly balance the equities at stake. The injunction is limited to correction of barrier culverts, Pet. App. 117a-118a, and the relevant cost to the State is that attributable to an accelerated schedule of culvert-correction that is already underway, which the district court found was necessary to remedy the treaty violation. *Id.* at 117a-118a, 177a. As the courts below found, moreover, "'[t]he balance of hardships tips steeply toward the Tribes,'" which were promised that they would be able to meet their subsistence needs forever. *Id.* at 121a. In any event, the reopening of salmon habitat that will be accomplished by corrected barrier culverts will benefit all citizens of Washington, *id.* at 178a, and honor what this Court recognized in *Fishing Vessel* was the central promise made to the Indians that the opening up of the Territory (and later the State) to

settlement would not crowd out the Indians from their ability to sustain themselves by taking fish at usual and accustomed grounds. 443 U.S. at 676.

This Court granted certiorari in *Fishing Vessel* "[b]ecause of the widespread defiance of the [d]istrict [c]ourt's orders" and an ongoing and irreconcilable conflict between the rulings of the Washington Supreme Court and federal courts concerning the questions presented. 443 U.S. at 679; see Pet. 9. There is no such conflict here, and there are no widespread practical exigencies that would require this Court's intervention. On the basis of an extensive factual record, the lower courts have succeeded in bringing this case to a fair resolution: the Tribes retain the fishing rights they were promised, and petitioner has only the duty to address barrier culverts (which it recognizes constitute a serious problem) based on a reasonable schedule with significant flexibility. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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